IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1223 OF 2005

Pramod Keshavrao Makeshwar. ... Applicant.
Versus.
The State of Maharashtra. ... Respondent.

Shri A.P.Mundargi with Shri A.R.Khan and Shri
M.K.Kocharekar for the Applicant.
Shri S.R.Borulkar, P.P. with Shri A.S.Gadkari, A.P.P.
for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 1st July, 2005.

P.C.:

1. On the last date the Counsel appearing for the parties were heard. Today the Application is kept for dictation of the order.

2. This is a Bail Application to which section 37 of the Narcotic Drugs and Psychotrophic Substances Act, 1985 (hereinafter referred to as the said Act of 1985), is applicable. It is not necessary to reproduce the provisions of section 37 of the said Act of 1985. Suffice it to say that the bail can be granted where the Public Prosecutor has opposed the Application, only when the Court is satisfied that there are reasonable ground for believing that the Applicant is not guilty of such offence and that he is not likely to commit any offence while on bail.

3. The Applicant before this Court is a Police Officer. The case of the prosecution is that in August 2004 the

Officers of Anti-Narcotic Cell, Cuffe Parade, Mumbai, got information that two persons, namely Keshavan and Murthy were likely to come at Sion for selling a Narcotic Drug. As per the usual procedure, a trap was laid and trap panchanama was recorded. The Officers of the Anti-Narcotic Cell spotted the two persons as per the information received. Keshavan was found possessing 1.600 kg. of Charas and Murthy was found possessing 2.400 kg. of Charas. By recording seizure panchanama, the said Charas was attached from the said two persons and the said two persons were apprehended. F.I.R. was lodged against them. During the course of investigation involvement of other accused, viz. Accused Nos.3 to 6 was disclosed. Accused No.5 Sudhakar Nadar was arrested and he gave memorandum of statement to the Police whereby it was revealed that Murthy and Keshavan were given charas by the Applicant who was attached to Antop Hill Police Station at the relevant time. The case of the prosecution is that the Applicant had regular talk with the Accused No.5 Sudhakar for 4 to 5 days after the raid on 20th August 2004. At the instance of Accused No.5 Sudhakar, an audio cassette recording the said conversation was recovered.

4. It is the case of the prosecution that one Sanjay Shinde and Pandurang Kamble brought one person carrying charas to the Police Station when the Applicant was performing his duty. The case of the prosecution is

that Sanjay Shinde and Accused No.5 Sudhakar took the person possessing Charas to the Applicant and the Applicant took the charas which was subsequently sold at the instance of the Applicant.

5. So far as the conversation which is allegedly recorded on the cassette recovered at the instance of Accused No.5 is concerned, the same was tested at the Central Forensic Science Laboratory and report dated 13th April 2005 is placed on record, which records that the voice in the cassette is of the Accused No.5 Sudhakar and the Applicant.

6. Shri Mundargi, the learned Counsel appearing for the Applicant has taken me through the relevant documents on record. He submitted that the memorandum of panchanama recorded at the instance of the Accused No.5 Sudhakar is of no consequence at all. He submitted that there is contravention of the provisions of section 42 of the said Act. He submitted that the statements which are recorded in the memorandum are hit by the provisions of section 25 of the Evidence Act. He submitted that only those statements recorded in the memorandum of panchanama which lead to the recovery of incriminating articles can be read under section 27 of the Indian Evidence Act. So far as breach of section 42 is concerned, he pointed out that there was no authorisation. He pointed out that the raid was not

conducted between sun rise and sun set. He submitted that there was no warrant issued.

7. Shri Mundargi further submitted that the statement of Sanjay Shinde and Prakash Kamble under section 161 of the Code of Criminal Procedure, 1973, cannot be relied upon as the said witnesses declined to give statement under section 164 of the said Code. He submitted that the efficacy and reliability of the said statements is substantially reduced as a result of the refusal of the said witnesses to give statement under section 164. He submitted that even assuming that the tape recorded conversation is admissible in evidence, the same does not make out a case against the Applicant for commission of any offence particularly under the said Act of 1985. He invited my attention to the relevant portion of the transcript of the said conversation.

8. The learned P.P. Shri Borulkar submitted that authorisation was obtained on 28th August 2004. He submitted that whether there was a breach of mandatory provisions of the Act or not was a question which has to be decided at the time of trial and today what is to be considered is whether there is any material available against the Accused. He submitted that the fact that the Applicant did not file any complaint is sufficient to indicate complicity of the Applicant. He submitted that no case was made out for grant of bail.

9. I have considered the rival submissions. It will be necessary to first refer to the statement of Sanjay Shinde and Prakash Kamble. The said statements are recorded under section 161 of the said Code of 1973. It is true that the said witnesses have not supported the prosecution to the extent that they have not recorded the statement under section 164 of the Code. However, it is not the case that the said witnesses have disowned their statements under the Code. That is the reason why the said statements will have to be considered as the material available against the Applicant. The witness Sanjay Shinde has stated that he knows accused No.5 Sudhakar very well. He stated that on 9th August 2004 at about 9.30 in the morning he saw three persons having fight in the market near his house. One of them was carrying a plastic bag which fell down on the road. When it fell down, he saw that in the plastic bag there were plastic paper covered chips and tablets. He felt that it was charas. He, therefore, instructed his friend Prakash to hold the persons who were carrying charas and he called his friend accused No.5 Sudhakar. On the suggestion made by Sudhakar, the said Sanjay and Prakash took them to the Applicant. Prakash waited outside and Sanjay and the said Sudhakar took the persons to the Applicant. According to him the Applicant informed him that he will decide as to what was to be done with the charas. He stated that in his

presence the charas was given in possession of the Applicant. Prakash Kamble in his statement has come out with the same story.

10. Thus there is material in the form of statements of the said witnesses to indicate that the charas was handed over in custody of the Applicant.

11. In so far as the grievance made regarding the panchanama is concerned, the submissions of Shri Mundargi are no doubt primafacie attractive. However, that is not the only piece of evidence and only material on record against the Applicant. In the trial, evidence will be led on the question of compliance of the statutory requirements under section 42 of the said Act.

12. Thus considering the material which is on record in the form of statements of the said two witnesses, it is impossible to record a satisfaction in terms of section 37 of the said Act. Considering the said material on record, it is not possible to record satisfaction that there are reasonable grounds for believing that the Applicant is not guilty of the offence alleged against him. I, therefore, find no reason to take a view different from the view taken by the learned Special Judge. In view of this, the application is rejected.

Judge.